(2)

No. 90-238

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1990

CITY OF DALLAS,

Petitioner,

v.

HOWARD M. ROSENSTEIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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August 1990

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QUESTIONS PRESENTED

1. Where a city police officer, during the investigation of his alleged wrongdoing, writes a "Dear Chief" letter stating "My reputation as a fine police officer . . . [is] now all but destroyed as a result of these false charges", and where the officer, after his discharge writes "I was fired . . . for something that I did not do" and "[I] request an appeal from this decision", and where the police department disseminated false information regarding the charges against the officer to the two Dallas newspapers, both of which gave it broad coverage, has not the officer requested a name-clearing hearing?

2. Where a police chief testifies that he makes all of the policies for a city's police department, where the assistant city manager concurs in this testimony, where the city charter, ordinances, and police code of conduct all provide that the police chief has exclusive right to suspend or discharge any officers, and where the police chief is not only never questioned about his testimony by the city but the city does not raise any issue to the contrary in presenting its case, is it not clear that the police chief is the official policymaker for the city in connection with the denial of a name-clearing hearing to a fired police department employee?

3. Where a city waives all issues relating to damages in a section 1983 case and where, for that reason, all reference to damages has been eliminated from a court of appeals decision, is it not clear that the city has no damages issue for which to seek review?

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No. 90-238

In The

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October Term, 1990

CITY OF DALLAS,

Petitioner,

v.

HOWARD M. ROSENSTEIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Howard M. Rosenstein, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals is reported at 901 F.2d 61, and is reprinted in the appendix to the petition for writ of certiorari, pp. App. 21-App. 29. The order of the court of appeals granting rehearing is

reported at 884 F.2d 173, and is reprinted in the appendix hereto, p. A.1, *infra*. The opinion of the panel of the court of appeals is reported at 876 F.2d 392 and is reprinted in the appendix to the petition for writ of certiorari, pp. App. 1-App. 20. The judgment of the district court (Pet. App. 30) and order of the district court denying petitioner's motion for new trial, motion for judgment n.o.v. and motion for partial judgment (Pet. App. 31) are unreported.

STATEMENT OF THE CASE

Respondent Howard M. Rosenstein (hereinafter "Rosenstein"), was verbally fired from his position as a probationary Dallas police officer by Chief Billy Prince on Friday, May 10, 1985, for allegedly making obscene and harassing telephone calls to Officer Amy Bradley. On the day of Rosenstein's firing, but *after* it occurred, police Captain Donald Milliken made statements to the two Dallas newspapers. Regarding the charges against Rosenstein, Milliken stated that Rosenstein allegedly made "eight or nine obscene/harassing calls" to an unnamed female officer. Rosenstein was fired because "it's a violation of the law . . . You can't have police officers violating the laws they're sworn to uphold." (Pl. Ex. 35). Milliken also said that Rosenstein was accused of making a series of "obscene and harassing" phone calls. "We looked at it for possible criminal violations, but there wasn't any way to make a case . . . " Also, according to Milliken, a voice analysis confirmed that it was Rosenstein who made the calls (Pl. Ex. 36).

Milliken was acting in accordance with a Dallas Police Department policy and custom of elaborating to the press on charges against disciplined officers, even though the charges might later be overturned (Tr. 233-44, 315-20, 326-28).

On April 28, 1985, during the internal investigation of the charges, Rosenstein wrote a "Dear Chief" letter in which he stated: "This is the first time in my life I must suffer the agony of being accused of something heinous that I did not do" and "My reputation as a fine police officer and good human being are now all but destroyed as a result of these false charges and investigation. My honor and integrity are at stake." (Pl. Ex. 29, A.2-A.6).

Chief Prince's termination letter informed Rosenstein that his [Prince's] decision was "final" (Pl. Ex. 37, A.7-A.8). In spite of this Rosenstein wrote City Manager Charles Anderson a letter saying, in part, that "I was fired . . . for something I did not do" and asking for an appeal (Pl. Ex. 38, A.9). Asst. City Manager Levi Davis [at the time the assistant city manager over the Dallas police department] responded that "the decision of the Chief of Police is final" and that Rosenstein was "ineligible for further appeal rights" (Tr. 68, 114-17, 325, Pl. Ex. 39, A.10). Neither Prince nor Davis ever informed Rosenstein of his right to a name-clearing hearing (Tr. 69, 117). The denial of a name clearing hearing was made pursuant to City of Dallas policy (Tr. 117-18, 325).

Rosenstein then brought this suit, requesting a name-clearing hearing in his Complaint (Tr. 72). He did not receive a name-clearing hearing until the time of trial.

The case went to trial under 42 U.S.C. § 1983 for violation of Rosenstein's constitutional rights and under state law for slander. The jurisdiction of the district court was invoked under 28 U.S.C. § 1343 and under its pendent jurisdiction. At trial the jury returned a verdict in favor of Rosenstein. The district court properly refused to submit Petitioners' proposed jury instructions defining "policymakers" and "official policy" as these were incorrect as applied to the facts of this case. The court also correctly found under the facts of this case that Rosenstein had requested a name-clearing hearing. The City of Dallas failed to object either to the form of the damages question or its submission, Question No. 6 (R. 348), and, thus, waived any objection it might have had to the submission of this question. Further, the City of Dallas did not raise any objection to the damage question in its motion for partial judgment, and for judgment notwithstanding the verdict or, alternatively, for a new trial.

On appeal, a divided panel upheld Rosenstein's damages award. However, all members of the panel agreed that under the facts of this case the Chief of Police was a final policymaker for the City of Dallas (Pet. App. 7-App. 8, App. 13). The court of appeals granted en banc review on September 7, 1989. This had the effect of vacating the panel decision.[1] On May 14, 1990 the en banc court of appeals reinstated the panel majority's opinion, except for footnote 2 and the section of the opinion dealing with damages. Because the City of Dallas waived any

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[1] 5TH CIR. R. 41.3 provides: "**Effect of Granting Rehearing En Banc.** Unless otherwise expressly provided, the effect of granting a rehearing en banc is to vacate the panel opinion and judgment of the Court and to stay the mandate."

error involved with the submission and award of damages, the judgment against the City of Dallas was affirmed (Pet. App. 21-App. 22).

REASONS FOR DENYING THE PETITION

This Court should deny the petition for certiorari because (1) the issues of this case are extremely fact specific and only questions of evidence and factual findings are involved; (2) the court below fully and correctly decided the issues; (3) the court of appeals correctly applied prior rulings of this Court to the facts of this case; and (4) the damage question was not preserved below and has been waived.

1. The Fifth Circuit did not err in affirming the district court's finding of fact that Respondent requested a name-clearing hearing.

There is no doubt, under the record of this case, that Rosenstein was stigmatized by false, widely publicized, charges against him, made in connection with his discharge, thus entitling him to a name-clearing hearing. *See Bishop v. Wood*, 426 U.S. 341 (1976); *Paul v. Davis*, 424 U.S. 693 (1976); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

On May 10, 1985, Chief Prince fired Rosenstein because he "made obscene and harassing telephone calls to Officer Bradley's residence." (Pl. Ex. 37, A.8). These charges were made public by a police department spokesman and published in the two Dallas newspapers.

By letter dated May 17, 1985, Rosenstein wrote to the Dallas city manager that "I was fired from the Dallas Police Department for something I did not do." He further "request[ed] an appeal from this decision." (Pl. Ex. 38, A.9). This request to participate in established grievance, appeal or other review procedures to contest false, stigmatizing charges was sufficient to state a request for a name-clearing hearing. A discharged employee need not use the term "name-clearing hearing." *Cf. Owen v. City of Independence*, 445 U.S. 622, 626-29 (1980).[2] Clearly, this put the City of Dallas on notice that Rosenstein was entitled to an opportunity to clear his name.

Chief Prince's letter told Rosenstein that the decision was final. Assistant City Manager Levi Davis' response to Rosenstein was also that the chief's decision was final.[3] In

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[2] The facts of this case bear remarkable similarity to *Owen*. Before being fired Owen wrote the city manager a letter, requesting specification of the charges against him and asking for a hearing, saying, in part, "your . . . discharge of me . . . without a full public hearing . . . will leave in the minds of the public and those who might desire to have my services, a stigma of personal wrongdoing on my part." *Owen*, 445 U.S. at 627 n.4. Once fired, Owen's attorney requested an appeal, which request was denied because there was no appeal procedure in the city charter for at will employees such as Owen. *Id.* at 629.

Here, before he was fired, Rosenstein wrote a "Dear Chief" letter decrying the false accusations against him and the damage to his personal and professional reputation (Pl. Ex. 29, A.2). After his discharge he requested an appeal, which was denied because there was no provision for same.

[3] The record is devoid of any method by which Rosenstein could have obtained a name-clearing hearing. Petitioners ask

(Continued on following page)

the absence of instructions to the contrary, Rosenstein's letter requesting an appeal from his firing for something he "did not do" was sufficient to invoke a liberty interest name-clearing hearing.[4]

The district court and the en banc court of appeals made a reasonable construction of Rosenstein's letter to the city manager under the facts of this case to interpret it as a request for a name-clearing hearing.

2. In light of the undisputed testimony that the police chief was the city's policymaker under Texas law, the Fifth Circuit did not err in affirming the district court's finding that the City of Dallas would be held liable for the unconstitutional conduct of the police chief.

The court of appeals correctly determined that the Dallas Chief of Police was a policymaker in respect to the

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the Court to believe that had Rosenstein specifically stated, "I request a name-clearing hearing", they would have provided him with one. The City put on no evidence to this effect and there is nothing in the record to so indicate.

Furthermore, nowhere in the city charter, police code of conduct or general orders admitted into evidence in the district court is there any provision for obtaining a name-clearing hearing. Respondent logically chose to follow an established method of raising his objections to the police chief's decisions in his attempt to obtain a name-clearing hearing.

[4] Dallas claims that it is entitled to a "fundamental right of reasonable notice" (Pet., p. 2). Yet it cites no cases to support this proposition. Under the facts of this case it clearly had notice that Rosenstein wanted to clear his name. Even after Rosenstein filed his complaint in the district court specifically requesting a name-clearing hearing, the city did not tender one to him (Tr. 72).

decisions to terminate Rosenstein and to not give him a name-clearing hearing. The panel unanimously agreed upon this point and the en banc dissent did not disagree (Pet. App. 7-App. 8, App. 13, App. 22, App. 29).

The police chief set all of the policies for the police department.[5] He was not cross-examined on that statement, nor was any issue raised to the contrary. This alone is enough to establish liability. *Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986) (municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances).

The police chief's uncontradicted testimony, coupled with the Dallas City Charter provisions admitted into evidence in the district court, makes it clear that under Texas law, the police chief was the policymaker when it came to firing probationary employees. DALLAS, TEX. CHARTER ch. VI, § 2(3), (4) and (14); ch. XII, § 2(1) (4) (1983) (Pl. Ex. 64 and 59, A.11 and A.14, respectively).

In its petition, the City of Dallas asserts that the city council supervises and controls the police chief. Under the facts of this case that statement is incorrect.[6] The

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[5] Chief Prince testified:

Q: You set all of the policies for the Police Department, do you not?

A. Yes, sir.

(Tr. 313).

[6] The only reference to this possibility is the chief's testimony that in 1980 the city council established a Police Citizen's Review Board to *review* their policies and Internal Affairs Division actions. However, the city council is prohibited by charter

(Continued on following page)

testimony of the police chief and assistant city manager, along with the charter provisions in evidence, leave room for no other conclusion than that the police chief was a policymaker when he fired Rosenstein and denied him a name-clearing hearing.

3. The original panel opinion which discussed damages was vacated. It was reinstated by the en banc court of appeals only as to those issues unrelated to damages. The damages award was affirmed because Petitioner had waived all damage issues. Thus, Petitioner cannot now raise any damage issues before this Court.

The effect of the grant of en banc reconsideration in the Fifth Circuit is to vacate the panel opinion. 5TH CIR. R. 41.3. When the en banc court reinstated the panel opinion as its own, it specifically excluded the writing under "Damages" (Pet. App. 21), thus making the panel's discussion of this point moot and irrelevant.

The en banc court of appeals then affirmed the district court's damages award on purely procedural grounds (Pet. App. 21). Since the Petitioner failed to object to the damages question prior to submission to the jury it waived any error which may have existed. FED. R. CIV. P. 51.

(Continued from previous page)

from interfering with the appointments or subordinates of the city manager. DALLAS, TEX. CHARTER ch. III, § 15 (1983) (Tr. 111-12, Pl. Ex. 63, A.17).

4. The Fifth Circuit's decision neither deviates from the rulings of this Court nor presents any issues of significance that warrant review.

The court of appeals decision correctly follows existing precedent. When *Perry v. Sindermann*, 408 U.S. 593, 603 (1972), held that an employee is entitled to a hearing if he requests one, it did not proscribe a hearing if the employee failed to use some "magic words" to invoke the hearing. Rather, the request for an appeal subsumes the request for a name-clearing hearing and is sufficient to put the employer on notice that one is being requested. *Cf. Owen*, 445 U.S. at 626-629 (Petitioner's pre-termination request for a specification of the charges coupled with his attorney's post-termination request for an appeal of the discharge deemed sufficient to request a name-clearing hearing).

Further, the court of appeals decision is consistent with *Pembaur*, 475 U.S. 469; *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); and *Jett v. Dallas Indep. School Dist.*, ___ U.S. ___, 109 S.Ct. 2702 (1989). In the present case the police chief had final authority to discharge probationary employees, and final authority as to whether or not such discharged employee would receive a name-clearing hearing. Thus, under *Pembaur* the Petitioner is liable for his actions. Assuming, *arguendo*, that the police chief's decisions were subject to review, they were reviewable only by the city manager or the assistant city manager to whom authority to oversee the police department was delegated, and not by the city council as Petitioner asserts. The conduct of the assistant city manager in ratifying the police chief's firing of Rosenstein, denying a hearing, and ratifying the police chief's reasons, was

consequently a final decision on this basis as well. As a final, unreviewable decision, it became municipal policy, subjecting Petitioner to liability. This is consistent with both *Praprotnik* and *Jett*.

Nor is the Fifth Circuit decision contrary to *Paul v. Davis*, 424 U.S. 693 (1976) or *Carey v. Piphus*, 435 U.S. 247 (1978). Rosenstein's reputation was impugned in connection with the termination process, thus raising the conduct from a mere slander to a constitutional deprivation. *Paul*, 424 U.S. at 710. At trial, Rosenstein adduced evidence of the mental anguish he sustained as a result of the denial of a name-clearing hearing, as well as evidence of damage to his professional and personal reputation. These are all actual damages which naturally flow from the unconstitutional conduct of the City of Dallas. Rosenstein clearly is entitled to recover the actual damages he sustained as a result of the constitutional deprivations. *Carey*, 435 U.S. 260-63. Any objection the Petitioner may have had to the inclusion of general reputation damages in the award (Pet., pp. 7, 9) was waived by its failure to object to the district court's charge to the jury.

In summary, the decision of the en banc court of appeals is a very narrow holding, very fact specific to the present case. The decision does not expand municipal liability, nor does it deviate from existing precedent. Rather, it correctly applies prior opinions of this Court to the facts adduced at trial to produce a result consistent with those facts and Petitioner's procedural errors. There is thus no reason for this Court to grant certiorari.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:

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Counsel for Respondent

August 1990.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1888

HOWARD M. ROSENSTEIN,

Plaintiff-Appellee,

versus

THE CITY OF DALLAS, TEXAS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC
(Opinion June 28, 1989, 5 Cir., 1989, ___ F.2d. ___)

(September 7, 1989)

Before CLARK, Chief Judge, GEE, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, and DUHE, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

PLAINTIFF'S EXHIBIT 29

Howard M. Rosenstein
6070 Lands End Circle #1032
Dallas, Texas 75231
4/28/85

Billy Prince
Chief of Police
Dallas, Texas 75201

Dear Chief Prince,

This is the hardest and most complicated letter I ever had to write in my life. This is the first time in my life I must suffer the agony of being accused of something heinous that I did not do. It is a pain that is very hard for me to handle. It is only because my best friend on the Police Department (Nancy Cawthon from SouthEast Division) told me you are the type of man who would at least listen to me that I decided to write this letter to you.

My life has been dedicated to public service. In 1980, I founded and directed the first successful rape prevention program at Northern Illinois University. I trained 10 years in the Korean Martial Arts and have taught many Chicago Police Officers. I have lectured at three universities on self defense for woman [sic]. I provided these services at no cost because I was concerned with the rape problem on campus and I perceived the need by the community for such programs.

I graduated with honors from both a top Northern University and Law School. Because of my shock of the way I saw the Chicago gangs tearing apart innocent people, I went to work for the Illinois States Attorney's Office – Gang Crimes Unit. However, I did not have enough political pull so I was unable to obtain a fulltime job with

the unit. At this point, I chose to enter the police profession. I was unsatisfied with the way I saw other lawyers milking people for money. My father has been in the police profession for 37 years and I found it to be the most honorable and noble thing I could do with my life.

The idea of a lawyer that wants to be a policeman is not understood by many. It is something that comes from within a person's soul and certainly has nothing to do with money. I was twice asked to join the Federal Bureau of Investigation by an FBI recruiter agent that came to my law school, but I turned it down because I wanted the stability of working in one area and not shifting from town to town.

I put my heart and soul into working for the Dallas Police Department and graduated third overall in the Academy, second top athlete, and second highest marksman. I helped two people pass the Academy and sacrificed my weekends doing it. In the short time that I have been on the Department I have received two commendations. They are enclosed.

I have not told anyone this yet, but recently I saved three lives from smoke inhalation in two separate incidents while off duty. Ordinarily, I would not go around telling people my good deeds, but my integrity is at stake and I feel I must do so now. These people would be more than willing to relate the incidents to you if you wish.

* * * * *

I requested that a voiceprint test be conducted. I practically had to beg for it, but Captain Milliken of the Internal Affairs Division stated he would not allow the

voiceprint test because he felt they were to unreliable. Please find enclosed the voiceprint research that I attained for you. It was a few days later that I heard they decided to go ahead with a voiceprint. However, as my research indicates, a voiceprint must be done with the subject saying the same words as the suspect. This was not done in my case.

Just last Friday Lt. Muncy and Sgt. Dorman informed me at 4:00 p.m. that the voiceprint results indicated that the voice on the suspect tapes could not be identified as me but that it was similar enough that it could be me. They told me the chain of command was going to recommend termination and that I was to immediately go home. I felt myself dying inside. No one would believe me that I did not commit this act.

When I was first asked to write my "Dear Chief" letter on March 29, 1985, concerning my whereabouts three weeks earlier on March 6th, 7th, and 9th, 8:45 a.m., 8:12 a.m., and 3:10 p.m., respectively, I did not know where I was. The 6th and the 7th were my regular days off, so I assumed I was home alone. I know I was with my girlfriend on March 9th the whole day. I know this because I shave spent every weekend with her for the past 2½ months. My girlfriend gave the Internal Affairs Division a sworn statement that she was with me at that time. She is a fine woman; we have been talking about getting married and she would not lie. With regard to March 6th at 8:45 a.m., it was not until I left Internal Affairs Division and looked at my car records that I was able to determine I was at Champion Ford Motor picking up my car that morning with my roommate. I spent the whole morning with my roommate. We had breakfast together and then

went in his truck to Champion Ford. My car was being serviced for an oil change. We were at the service station for over an hour and did not leave until after 9:00 a.m. The reason we were at the service area so long was because I didn't realize one had to pay for the oil change before they brought the car up front. Luckily, the service manager remembered me and also gave a sworn statement to the Internal Affairs Division along with my roommate. I do not have a copy of my girlfriend's sworn statement because I was not given a copy.

Chief Prince, I do not know Amy Bradley other than working in the same station with her. I have never had her phone number nor did I ever have any desire for her phone number. I have never had any contact with this officer except that on one occasion she covered my partner (Rick Wilson) and myself on a suicide. I've said "hi" in the hallways in the police station to this officer just like I say "hi" to any other officer.

* * * * *

I have heard these tapes. The man speaking uses phrases that I have never used in my life. He used the phrase *"we need to sit down and figure this out"*. In his use of the word "figure" it sounds as if he drops the "re" from the word. I have never spoken like that.

In all fairness to myself and to you, I must relay the following event to you. During my second phase of training my Field Training Officer Harry Morrell took me on duty into a place called "Sugars" on Greenville Avenue. It is a nude dancing place and I had never been in it before. While I was standing next to my FTO, a waitress came up to me, pointed at me and stated "You're the one from

Chicago – you need to wait here until the dancer is finished because she wants to talk to you." The waitress then pointed to a dancer. I immediately relayed to my FTO the conversation. We never got a chance to find out how this dancer knew me nor why she wanted to talk to me because we ended up arresting a man there for public intoxication. For the next couple days, I asked myself 100 times how it could be possible for this dancer, that I have never seen before, to know about me. It was not until later that I found out two NorthEast Dallas Police Officers were in that establishment talking to the dancers about me earlier. Two days after the incident I got off of work and decided to find out from this dancer who was talking about me and how she knew me.

While I was waiting for this dancer to finish and talk to me, the management called the police stating there was a possible police impersonator. I've enclosed the memorandum concerning the incident by Sergeant Young.

* * * * *

My reputation as a fine police officer and good human being are now all but destroyed as a result of these false charges and investigation. My honor and integrity are at stake. I ask you to please believe me. I have never lied to anyone on this department. All I ask is to get me away from the NorthEast Division and transfer me to SouthEast to work with Nancy Cawthon and my friend, Jude Braun.

Sincerely,

Howard Mark Rosenstein
Dallas Police Officer
NorthEast Division

[Deletions in letter made prior to its admission.]

PLAINTIFF'S EXHIBIT 37

CITY OF DALLAS

May 13, 1985

Mr. Howard M. Rosenstein
6070 Lands End Circle
Dallas, Texas 75231

Dear Mr. Rosenstein:

Pursuant to the authority vested in me as Chief of Police by the Charter of the City of Dallas, I hereby discharge you from your employment as an employee of the Dallas Police Department, effective close of business May 10, 1985.

I have taken this action because you violated Chapter IV, Section 4.3, of the Police Code of Conduct, which reads as follows:

POLICE CODE OF CONDUCT

CHAPTER IV – PROFESSIONAL CONDUCT AND PERSONAL BEARING

4.3 No employee shall engage in any personal conduct or act which, if brought to the attention of the public, could result in justified unfavorable criticism of that employee or the Department. No employee shall be involved personally in disturbances or police incidents to his discredit.

On March 6, 1985, at approximately 8:45 a.m., Officer Amy B. Bradley, #5011, received two telephone calls during which the caller made obscene sexual remarks. On March 7, 1985, at approximately 8:12 a.m., Officer Bradley received two more calls. During the first, call the suspect said nothing. During the second call, the suspect again made obscene sexual remarks. On March 9, 1985, at

approximately 3:10 p.m., Officer Bradley received a total of seven (7) telephone calls in which the content ranged from sexual overtones to general conversation. Officer Bradley tape recorded the calls made on March 9, 1985, and turned the tape over to her supervisor. Officer Bradley stated at that time that she suspected you were the person making the calls.

On April 12, 1985, a voice identification comparison was made comparing the tape recording that Officer Bradley had made of the March 9, 1985, calls to her residence and a tape recording of a conversation between you and Investigator C. M. Coit of the Internal Affairs Division that occurred on March 12, 1985. The results of the comparison revealed that the voice of the suspect making the calls to Officer Bradley's residence and your voice were the same. In summary, you were the person making the calls to Officer Bradley's residence.

You violated Chapter IV, Section 4.3, of the Police Code of Conduct, when on March 6, 7 and 9, 1985, you made obscene and harassing telephone calls to Officer Bradley's residence.

Because you were a probationary employee of the Dallas Police Department, my decision in this matter is final.

Sincerely,

/s/ Billy Prince
Billy Prince
Chief of Police

JLC

PLAINTIFF'S EXHIBIT 38

May 17, 1985

Mr. Charles S. Anderson
Dallas City Manager
1500 Marilla Street
Dallas, Texas 75201

Dear Sir:

On May 10, 1985, I was fired from the Dallas Police Department for something that I did not do. I received the formal written confirmation of my termination from Chief Prince on May 14, 1985. I hereby request an appeal from this decision. I may be contacted at the address and phone listed below.

Respectfully submitted,

Howard Mark Rosenstein
6070 Lands End Circle #1032
Dallas, Texas 75231
(214) 739-6455

PLAINTIFF'S EXHIBIT 39

May 21, 1985

Mr. Howard M. Rosenstein
6070 Lands End Circle, #1032
Dallas, Texas 75231

Dear Mr. Rosenstein, Certified: 701-562

Your request to appeal your termination from the City of Dallas Police Department was received in the City Manager's Office.

However, as stated in Chief Prince's letter of May 13, 1985 in accordance with the Police Code of Conduct the decision of the Chief of Police is final. You were a probationary employee and therefore ineligible for further appeal rights.

Sincerely,

/s/ Levi H. Davis
Levi H. Davis
Assistant City Manager

mk

cc: Civil Service
City Personnel
City Secretary
City Attorney
Police Department

PLAINTIFF'S EXHIBIT 64

CHAPTER VI. THE CITY MANAGER

SEC. 1. APPOINTMENT; REMOVAL; COMPENSATION.

The council shall appoint a city manager, who shall be the chief administrative and executive officer of the city. The manager shall be chosen by the council solely on the basis of his executive and administrative training, experience and ability, and without regard to political consideration, and need not, when appointed, be a resident of the City of Dallas or the State of Texas. No member of the council shall, during the time for which elected, be chosen as city manager. The city manager shall not be appointed for a definite fixed time, but shall be removable at the will and pleasure of the council upon a two-thirds vote of the members of the council unless otherwise provided by contract. He shall be given at least 60 days' notice prior to his removal from office. If removed after serving three months he may demand written charges and the right to be heard thereon at a public meeting of the council prior to the date on which his final removal shall take effect; but pending such hearing the council may suspend him from office. The action of the council is suspending or removing the city manager shall be final, it being the intention of this Charter to vest all authority and fix all responsibility for such suspension or removal in the council. The city manager shall receive such compensation as may be fixed by the council. (Amend. of 6-12-73, Prop. No. 13; Amend. of 4-3-76, Prop. No. 4)

SEC. 2 POWERS AND DUTIES OF THE CITY MANAGER.

The powers and duties of the city manager shall be as follows:

(1) To be responsible to the council for the proper administration of all the city affairs placed in his hands, and shall to that end appoint and employ all directors of departments and other employees not otherwise provided in this Charter or by ordinance. Appointments made by him shall be on the basis of executive and administrative experience and ability and of training fitness and efficiency of such appointees in the work which they are to administer. All such directors of departments shall be immediately responsible to the city manager and may be removed by him at any time. In case of removal after six months service, if the director removed so demands, a written statement shall be made by the city manager of the reason of his removal, and the director shall, if he so demands, be given a public hearing by the council before the order removal is made final. The statement of the manager and any written reply of the director thereto shall be filed as a public record in the office of the city secretary.

(2) To see that all laws and ordinances are enforced.

(3) Except as otherwise provided by the Charter of the City of Dallas, to appoint and remove all heads of departments and all subordinate officers and employees of the city; all appointments to be upon merit and fitness alone, and in the classified civil service all appointments shall be subject to the civil service provisions of this charter.

(4) To exercise control over all departments and subdivisions thereof created by the Charter, or that may hereafter be created by the council, except as hereinafter provided.

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(14) In the absence or inability of the city manager, his duties, including the execution of legal instruments, shall be performed by the assistant city managers in the order of precedence as may be designated by city ordinance, and the city manager may designate any of the assistant city managers to perform any of the powers and duties imposed on the city manager by this Charter. (Amend. of 4-3-76, Prop. No. 4)

[Excerpted by Respondent.]

PLAINTIFF'S EXHIBIT 59

CHAPTER XII. POLICE DEPARTMENT

SEC. 1. CREATION OF POLICE DEPARTMENT; PERSONNEL.

There is hereby created a police department of the City of Dallas at the head of which shall be the chief of police. The police department shall be composed of the chief, whose office is hereby created and established, and other unclassified positions of assistants, limited to the two grades or ranks immediately below the grade or rank of chief, and classified employees as the council may provide by ordinance upon recommendation of the city manager. The chief of police shall designate the order of succession of the assistant chiefs, who shall perform the duties of the chief in the event of his disability, absence from the city or inability to perform his duties from any other cause. The designated person shall receive no additional compensation for performing the duties of chief of police. (Amend. 6-12-73, Prop. No. 26)

SEC. 2. DUTIES.

The chief of police shall:

(1) have immediate direction and control of the police department, subject to the supervision of the city manager, and also subject to such rules, regulations and orders as the city manager may prescribe, not in consistent with the ordinances of the city, and shall promulgate all orders, rules and regulations for government of the police force:

(2) devote his entire time to the discharge of his official duties, and shall not be absent from the city except in the performance of his official duties, unless granted a written leave of absence by the city manager;

(3) keep his office open at all hours, day and night, and either he or his subordinate shall be in constant attendance of such office;

(4) prescribe the uniforms and badges for the members of the police force and direct the manner in which the members of the said force shall be armed;

(5) perform such other duties as may be required of him by the city manager or by ordinance of the city council.

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SEC. 4. SUSPENSION OF POLICE; HEARING.

The chief of police shall have the exclusive right to suspend for a definite time or discharge any of the officers or employees who may be under his jurisdiction and control for incompetence, neglect of duty, immorality, drunkenness, or failure to obey orders given by the proper authority, or the orders, rules and regulations promulgated by the chief of police. If any officer or employee be suspended or discharged, as herein provided, the chief of police shall forthwith in writing certify the fact, together with the cause for the action, to the city manager. The officer or employee suspended or discharged shall have five days from receipt of notice of such action within which to demand a hearing before the city manager, but such demand must be made in writing. If demanded, the city manager shall proceed to inquire

into the cause of the suspension or discharge and render judgment thereon, which judgment, if the charge be sustained, may be suspension, reduction in rank, discharge, or such modification or amendment as to him may seem just and equitable under all the facts and circumstances of the particular case. Such judgment shall be final unless a discharged officer or employee shall desire to avail himself to the right of a public hearing before a trial board as provided by this Charter. (Amend. of 4-3-76, Prop. No. 5; Amend. of 4-2-83, Prop. No. 7)

[Excerpted by Respondent.]

PLAINTIFF'S EXHIBIT 63

CHAPTER III. CITY COUNCIL

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SEC. 15. NO INTERFERENCE BY COUNCIL WITH APPOINTMENTS OR SUBORDINATES OF CITY MANAGER.

Neither the council nor any of its committees or members shall dictate or attempt to dictate the appointment of any person to, or his removal from, office or employment by the city manager or any of his subordinates, or in any manner interfere in the appointment of officers and employees in the departments of administrative service vested in the manager by this Charter. Except for the purpose of inquiry, the council and its members shall deal with that part of the administrative service for which the city manager is responsible solely through such manager, and neither the council nor any member thereof shall give orders to any of the subordinates of the city manager in said departments, either publicly or privately. This section shall not apply to those professional and secretarial assistants provided for in Section 14 of this chapter. (Amend. of 6-12-73, Prop. No. 7)

[Excerpted by Respondent.]